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THE IMPACT OF ERIE UPON THE FEDERAL RULES

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Nineteen hundred and thirty-eight was an important vintage year. First, came the earth-shaking decision of *Erie R.R. v. Tompkins*,[1] second, the promulgation of the Federal Rules of Civil Procedure. Harry Tompkins had been struck by the door of a railroad coach while walking along the right-of-way of the Erie Railroad near Hughestown, Pennsylvania. Only a few months ago in the Supreme Court, there were further reverberations from that blow. These reverberations were the echoes from the inevitable collision between the *Erie* doctrine and the Federal Rules. It is this collision that is the subject of this discussion.

The collision between *Erie* and the Federal Rules is more significant than the recurring phenomenon of one legal concept gradually or hurriedly overriding or eroding another. Accepting *Erie* as good law, whether a constitutional doctrine or not, it is hardly worth the price if the Federal Rules must give way to different state rules. The adoption of the Federal Rules was, in this author's opinion, one of the greatest forward steps in American legal history.

In tackling this subject, it is comforting to note that Professor Wright, in referring to the Rules of Decision Act,[2] stated that "no issue in the whole field of federal jurisprudence has been more difficult than determining the meaning of this statute."[3] One may also take comfort, when attempting to put the cases together, from the statement made by Mr. Justice Harlan in April of this year that "it is unquestionably true that up to now *Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions."[4]

It has often been said that the *Erie* doctrine, and therefore state law, applies to questions of substance litigated in the federal courts in diversity cases and that federal law and rules

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1. 304 U.S. 64 (1938).

2. 28 U.S.C.A. § 1652 (1948).

3. WRIGHT, FEDERAL COURTS 187 (1963). The volume of literature on this subject is staggering. In addition to Professor Wright's admirable treatise see 62 HARV. L. REV. 1030 (1949) and 77 HARV. L. REV. 1084 (1964).

4. Hanna v. Plumer, 85 Sup. Ct. 1136, 1145 (1965).

apply to questions of procedure. This distinction becomes more complex than it initially appears when a mere practicing attorney attempts to draw the line between substance and procedure. In fact, it has become apparent that the line is not drawn on a strictly substance *vis à vis* procedure yardstick.

In 1945, the Supreme Court grafted an important refinement onto the doctrine of *Erie* in *Guaranty Trust Co. v. York*.[5] The case involved a diversity suit brought against a trustee under an indenture securing an issue of notes, and the primary defense was the bar of the New York statute of limitations. The Supreme Court held that, in the case of a state-created right, *Erie* required the federal court to apply the state statute of limitations despite the fact that the suit was brought in equity. There can be little argument with the result of this case. However, the Court went further to restate the test of the *Erie* doctrine: Where the application of any state legal rule could determine the outcome of a litigation, the federal court should apply it as if the case had been tried in state court. For those who like labels, this is referred to as the "outcome-determinative" test. It was at this point that the collision with the federal rules began, for as is well known, many purely procedural rules *can* affect the outcome of a litigation.

Those crepe-hanging commentators who predicted from *Guaranty Trust* the death knell of the federal rules appeared justified in their conclusions when, on June 20, 1949, three diversity cases were decided,[6] each of which rode roughshod over one of the federal rules. A few writers went so far as to advocate the repeal of the rules insofar as they applied to diversity cases.[7]

One of this trio was *Cohen v. Beneficial Indus. Loan Corp.*[8] In New Jersey, where this stockholder's derivative suit was tried, there was a state statute requiring the plaintiff, as a pre-requisite for the maintenance of such a suit, to post a bond for costs including attorneys' fees in the event of his losing the case. Federal Rule 23(b) specifically applies to such suits and requires that the complaint be verified and that it assert certain facts

5. 326 U.S. 99 (1945).

6. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

7. Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); Gavit, *States' Rights and Federal Procedure*, 25 IND. L.J. 1 (1949).

8. 337 U.S. 541 (1949).

about the shareholder plaintiff and his efforts to obtain relief from the directors and other shareholders, but does not require a bond. The Court required the application of the New Jersey statute, although apparently procedural in nature.

Another case decided the same day was *Ragan v. Merchants Transfer & Warehouse Co.*[9] Federal Rule 3 states that an action is commenced in federal court by filing a complaint with the court. In *Ragan* the complaint had been filed before the expiration of the state statute of limitations but personal service was not accomplished until after the statutory period had run, and the state statute, as does the South Carolina statute for example, required personal service of process to toll the running of the statute of limitations. The Supreme Court held that the action should have been dismissed and that the state statute was to be followed despite the language of Federal Rule 3.

The third in this series of cases was *Woods v. Interstate Realty Co.*[10] There a suit was brought in Mississippi by a Tennessee corporation for a broker's commission. A Mississippi statute provided that a foreign corporation failing to domesticate would not be permitted to bring an action in the courts of that state. However, Federal Rule 17(b) states that the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. The Supreme Court held that the corporation would not be permitted to bring its suit in Mississippi because of the Mississippi statute.

This represented the high tide of the "outcome-determinative" test and carried the *Guaranty Trust* case to its extreme. All these cases provide topics for considerable argument. For example, the *Cohen* case may be attacked on the ground that the bond requirement was not relevant to merits or substance of the case, but merely to the plaintiff's financial ability to get into court, and that the state statute, being procedural, should have been ignored. On the other hand, it may be justified, as the majority of the Supreme Court did last April in *Hanna v. Plumer*[11] by the anti-forum shopping doctrine that the federal court should not open doors to suits where those doors are closed in the state courts. It is further justified by Mr. Justice Harlan's concurring opinion which says that the *Cohen* case is justified by the exist-

9. 337 U.S. 530 (1949).
10. 337 U.S. 535 (1949).
11. 85 Sup. Ct. 1136 (1965).

ence of a strong legislated state policy against strike suits by minority stockholders.

Some nine years after what is referred to as the triple-play on the Federal Rules,[12] the rule-drowning high tide appeared to ebb. In 1958, the Court decided *Byrd v. Blue Ridge Rural Elec. Co-op.*,[13] a case that arose in South Carolina. Stripped to its essentials, the plaintiff had brought an action for negligence for injuries sustained while working on the defendant's power sub-station. The defense was that the plaintiff was an employee within the meaning of the South Carolina Workmen's Compensation Act. South Carolina decisions appeared to require that such a question be decided by the trial judge. However, the Supreme Court said that in a diversity case in federal court this question should go to the jury.

Taking their cue from the *Byrd* decision, federal courts of appeals and district courts became braver in applying a federal rule, although in conflict with a state rule. For example, in *Iovino v. Waterson*,[14] the United States Court of Appeals, Second Circuit permitted the substitution of the plaintiff's administratrix as party plaintiff pursuant to Federal Rule 25(a)(1), although this would have been impossible under the practice then prevailing in the state of New York. In the same circuit in 1960, the court upheld service of process upon a foreign corporation in compliance with Federal Rule 4(d) as valid, although it was doubtful under state law.[15] Florida has a statute making an injured person's statement inadmissible unless a copy has been given to him. The Fifth Circuit held such a statement was admissible in federal court.[16] Rationalization: the policy of the state is to encourage disclosure of such statements.[17]

Before carrying this discussion to the latest chapter as far as the procedural rules are concerned, a brief comment on rules of evidence seems appropriate. In this area there are far fewer landmark decisions. Federal Rule 43(a) pertains to admissibility and has a triple test, admitting evidence admissible under the statutes of the United States, or rules of evidence in federal suits in equity, or under the rules applied in the state court. It would

12. Merrigan, *supra* note 7.
13. 356 U.S. 525 (1958).
14. 274 F.2d 41 (2d Cir. 1959).
15. Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).
16. Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).
17. *Id.* at 413.

be virtually impossible to find a neat set of rules pertaining to the admissibility of evidence in federal equity cases, and there are few federal statutes pertaining to evidence.

Despite the obvious risks of generalizations in the area of evidence, a few seem justified. The "parol evidence rule" appears to be universally regarded as one of substance, despite its title, and is governed by state law.[18] The matter of burden of proof also appears to be governed by state law.[19] The doctrine of *res ipsa loquitur* likewise appears to be governed by state law.[20] However, on the matter of judicial notice, especially as to the laws of other states, Federal Rule 43(a) apparently applies despite state law.[21] The Supreme Court has clearly said that on matters of discovery such as compulsory physical examination the federal rule governs despite state rules to the contrary or absence of state rules permitting it.[22] Professor Wright documents the logical conclusion that state law governs questions of privileged testimony because of considerable variance among the states with fairly strong policies in this regard.[23] *Monarch Ins. Co. v. Spach*[24] evidently is regarded as holding that *Erie* does not require exclusion of evidence otherwise admissible under Federal Rule 43(a).[25]

Will a state rule require exclusion of evidence not admitted specifically under Federal Rule 43(a)? There appears to be a conflict among the circuits that must wait upon the Supreme Court for clarity. The Third Circuit reluctantly held that testimony of the surviving party to an auto accident was barred by a state "dead man statute."[26] The Fifth Circuit admitted an old newspaper article concerning a fire, although technically hearsay under state practice, as necessary and trustworthy and material to the issue to prove that lightning did not cause a tower to fall.[27]

18. See Annot., 141 A.L.R. 1043 (1942); 1A MOORE, FEDERAL PRACTICE ¶ 0.313 (2d ed. 1959).

19. *E.g.*, Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939). See also 1A MOORE, FEDERAL PRACTICE ¶ 0.314(2) (2d ed. 1959).

20. *E.g.*, Coca Cola Bottling Co. v. Munn, 99 F.2d 190 (4th Cir. 1938). See also 1A MOORE, FEDERAL PRACTICE ¶ 0.315(2) (2d ed. 1959).

21. See 1A MOORE, FEDERAL PRACTICE ¶ 0.316(4) (2d ed. 1959).

22. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

23. WRIGHT, FEDERAL COURTS 359-60 (1963).

24. 281 F.2d 401 (5th Cir. 1960).

25. WRIGHT, FEDERAL COURTS 359 n.19 (1963).

26. Wright v. Wilson, 154 F.2d 616 (3d Cir. 1946).

27. Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961).

The Judicial Conference of the United States is supporting the adoption of a uniform federal rules of evidence.[28] If we accept the *Erie* case as a statement of constitutional law,[29] these proposals may be vulnerable although the recent case of *Hanna v. Plumer*[30] may be argued in their behalf. However, they are in a much better position of withstanding a challenge if their draftsmen avoid policy rules such as parol evidence and privilege and stick largely to hearsay, relevance, and housekeeping type rules.

The latest chapter in the impact of the *Erie* case upon the federal rules is *Hanna v. Plumer*[31] decided in April of 1965 by the Supreme Court. In a nutshell, the service of process upon the defendant executor was made in compliance with Federal Rule 4(d)1, but not in compliance with the Massachusetts law which required service in hand. The Supreme Court per Mr. Chief Justice Warren reversed a dismissal of the case, reminding us that the "outcome-determinative" test of the *Guaranty Trust* case is not necessarily to be taken literally.

Hanna v. Plumer in a way is a landmark case in that it removes some of the fears about the erosion of the federal rules by the *Erie* case. It is not actually new law but rather clarifies and adds better perspective to the present state of the law. It says simply what should have been said earlier to prevent the *Guaranty Trust* case from being carried to a ridiculous extreme.

Even now, stating the test of the *Erie-Guaranty Trust-Byrd-Hanna* doctrine in such a fashion that it will not be carried to ridiculous extremes is a most difficult part of this subject. While we all pretend to wish for some automatic test, we are probably better off without it because we are concerned with a complicated policy which is not easily articulated into a short, snappy label. We must remember the policy of *Erie* against forum shopping, and the support of uniformity within a given state. We must remember *Guaranty Trust* that in general the results on the *merits* should be the same in a federal court as a state court. The basic idea is that the character or result of a litigation should not differ *materially* because it is brought in federal court. In

28. For an expert discussion of the difficult aspects of this problem see Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1963).

29. Whether *Erie* is or should be a constitutional doctrine or merely statutory interpretation has inspired much professional prose. See WRIGHT, FEDERAL COURTS 197 nn.13 & 14 (1963).

30. 85 Sup. Ct. 1136 (1965).

31. *Ibid.*

the concurring opinion in *Hanna v. Plumer*, Mr. Justice Harlan indicates that the water is still muddy and suggests that the proper line of approach in applying a state or federal rule, whether substantive or procedural, is to inquire whether the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. He states that *Erie* and the Constitution require that the state rule prevail in such an event over a conflicting federal rule.

The problems in this area are often greater in theory than in practice, because one can often justify the results of some of the apparently conflicting cases. The trouble arises in trying to fashion a general rule. Many of the previous cases are of dubious value as statements of a rule. In fact, Mr. Justice Harlan states that the *Ragan* case is plainly wrong. *Cohen*, on the other hand, can be justified as a federal rule yielding to a strong state policy.

However, it is quite apparent from *Byrd* and *Hanna* that the Federal Rules are here to stay, although there will be further reverberations where they conflict with a state rule—especially if it is a rule of *policy* rather than arbitrary choice of method.